



TRANSPORTATION CABINET

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MEMORANDUM

TO: All Pre-qualified Consultants

FROM: James H. Wathen, P.E., P.L.S. *JHW*
Director
Division of Program Performance

DATE: April 12, 2006

SUBJECT: Implementation of the Brooks Act

On November 30, 2005, the President signed into law the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 (119 Stat. 2396; Public Law 109-115, HR 3058 ("the FY 2006 Appropriations Act"). Section 174 of this Act, amends 23 U.S.C. 112(b)(2) relating to the award of engineering and design services (A&E) contracts that are directly related to a construction project and use Federal-aid Highway Funding. This amendment strikes the existing "Opt Out" provision of law and requires that these contracts shall be awarded in the same manner as an original contract. Architectural and engineering services are negotiated under the "Brooks Act" provisions contained in Chapter 11 of 40 U.S.C.

The purpose of this memorandum is to clarify the Kentucky Transportation Cabinet's (KYTC) policy on the implementation of the Brooks Act and its removal of overhead and wage rate caps. This policy will ultimately apply to contracts negotiated for engineering, design, and related professional services on both state and federally funded projects. Note that there will be a transition period necessary for state funded projects due to necessary changes in the Kentucky Administrative Regulations (KAR). The Brooks Act requires agencies to promote open competition by advertising, ranking, selecting, and negotiating federal project contracts based on demonstrated competence and qualifications for the type of engineering and design services being procured at a fair and reasonable price. Previously, the KYTC and several other states were granted an exception to the requirements relating to audits and indirect cost rates. That exception has now been eliminated, and KYTC must follow the Brooks Act requirements when procuring engineering and design services using Federal and Highway Funding.

Federal project contracts negotiated for services that were advertised **after** December 1, 2005 (e.g. January 2006 Professional Services Procurement Bulletin 2006-04 and all subsequent advertisements) will be negotiated **without** applying **caps** to overhead and wage rates as called for in Kentucky Administrative Regulations 600 KAR 6:070 Section 2 (Pre-negotiation Procedures Contracting for professional engineering or related services) and in 600 KAR 6:080 Section 2 (Limitations on Direct Costs and Indirect Costs.) Federal project contracts negotiated for services that were advertised **before** December 1, 2005 (e.g. October 2005 Professional Services Procurement Bulletin 2006-03 and all previous advertisements) will be negotiated **with** **caps** to overhead and wage rates applied. Contract Modifications will be negotiated with the same terms and conditions as were in place at the time of the original agreement. So, if a project agreement was negotiated with overhead and wage rate caps, as long as the subject modification is within the existing scope of the contract as advertised in the bulletin, any caps that were included in the contract would still apply.

Conversely, in the case where additional services are significantly different than what was originally advertised or the additional services are significantly more than what was originally advertised, a new advertisement for services will be published in a Professional Service Procurement Bulletin. The newly procured services will be negotiated as a new agreement without overhead and wage rate caps. KYTC Project Managers should advise the Division of Program Management of the date and scope of the original bulletin as well as the scope of the new funding request.

Until the appropriate state regulations can be modified, KYTC will continue to negotiate state contracts in accordance with these existing regulations. The changes to the Kentucky Administrative Regulations are targeted for submission to the Legislature by May 15 with an anticipated review by August 2006. As soon as the regulations are properly adjusted, KYTC will use the same approach to request proposals for both state and federally funded consultant service agreements.

JHW/LM

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